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CLERK

9:38 am, Jul 01, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE

-----X **Docket#**
UNITED STATES OF AMERICA, : 13-cr-00607-JFB
: :
- versus - : U.S. Courthouse
: Central Islip, New York
: :
KENNER, et al., : June 28, 2021
Defendants : 12:09 PM
-----X

TRANSCRIPT OF CRIMINAL CAUSE FOR SENTENCING
(RESTITUTION)
BEFORE THE HONORABLE VISITING JOSEPH F. BIANCO

A P P E A R A N C E S:
(VIA TELEPHONE)

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Proceedings

1 THE CLERK: Criminal Cause for Sentencing, 13-
2 cr-607, USA v. Phillip Kenner.

3 Counsel, please state your appearances,
4 starting with the government.

5 MR. HAGGANS: Good afternoon, your Honor.

6 This is Matthew Haggans for the United States
7 today. Just for the Court's information, I think there
8 may be some additional members of the prosecution team
9 who will be listening today and there are also, I think,
10 a number of interns from our office who also be listening
11 to today's proceeding.

12 THE COURT: All right. Good afternoon, Mr.
13 Haggans.

14 THE DEFENDANT: Good afternoon, your Honor.

15 THE COURT: Good afternoon.

16 THE COURT: Good afternoon, Mr. Kenner.

17 MR. BRISSENDEN: Good afternoon, your Honor.

18 Matthew Brissenden, standby counsel for Mr.
19 Kenner.

20 THE COURT: Okay. Good afternoon, Mr.
21 Brissenden.

22 So as you know, the Court scheduled this
23 follow-up conference with respect to the restitution
24 issue. First, I just want to cover the fact that we're
25 proceeding by audio. I did receive a letter from Mr.

Proceedings

1 Brissenden indicating that Mr. Kenner wanted to proceed
2 by audio rather than into come into court in person or to
3 proceed by way of video which I understand would have
4 taken another several weeks in order to find an open time
5 slot in the jail.

6 We did have it on for a video conference. I
7 think it was the day of Judge Katzmann's memorial if my
8 memory is correct, so I apologize having to cancel that
9 at the last minute but in any event, Mr. Kenner, I just
10 want to confirm that you are agreeable to proceed by way
11 of audio today.

12 THE DEFENDANT: Yes, sir, thank you for asking.

13 THE COURT: All right. And the government
14 consents as well?

15 MR. HAGGANS: Yes, the government consents,
16 your Honor. This is Matthew Haggans speaking. And just
17 for purposes of the record, I would note it's the
18 government's understanding that part of the defendant's
19 objection to proceeding in person was that he would have
20 been required to quarantine upon return to MDC,
21 notwithstanding his vaccination status and it was his, as
22 I understand it, it was the defendant's preference to not
23 have to go through that kind of quarantine procedure.

24 The last time I checked with MDC, they do
25 continue to require vaccination regardless of -- excuse

Proceedings

1 me, to require quarantine regardless of vaccination, if
2 an inmate leaves the facility and so with that
3 supplement, the government has no objection to proceeding
4 by phone today.

5 THE COURT: Yeah, thank you for putting that on
6 the record. That's my understanding too. I have to say
7 it's very frustrating for the Court because like Mr.
8 Kenner, many defendants don't want to be transported for
9 a conference and then have to quarantine for 14 days,
10 even if they've had their vaccination.

11 But let me just confirm with Mr. Kenner that
12 that is accurate. That you did not want to come in
13 person, Mr. Kenner, in part because of the quarantine
14 issue?

15 THE DEFENDANT: Yeah, the 21-day quarantine is
16 -- was the issue, your Honor.

17 THE COURT: It's 21? I thought it was 14.
18 It's 21 days?

19 THE DEFENDANT: Your Honor, it's 14 days after
20 the first testing day and the first testing day is
21 anywhere between realistically the third and the seventh
22 day in quarantine.

23 THE COURT: All right. So -- yeah, for the
24 record, under the CARES Act, obviously the chief judge
25 has continued to allow conferences to take place by audio

Proceedings

1 or video and given the situation as we have described
2 where Mr. Kenner, to come in person, would have to
3 quarantine for 21 days, I'm not going to subject him to
4 that unless it's his desire to do so.

5 Video conferencing is obviously the next best
6 option but it is not reasonably available at this time
7 only by way of -- it would be delay and this has gone
8 on, obviously for many months and my hope is to allow --
9 is to complete the restitution portion so that Mr. Kenner
10 can move forward with respect to his appeal and also to
11 be designated.

12 So I find that the restitution cannot be
13 further delayed without serious harm to the interest of
14 justice for those reasons. I do think, unfortunately,
15 based upon what I've read, the parties can obviously
16 address these issues. We may need one more conference in
17 order to resolve some of these outstanding issues
18 including the most recent letters that the government has
19 submitted that I don't know that Mr. Kenner has had a --
20 I know (indiscernible) writing and respond to but I do
21 want to discuss.

22 So just way by background, the Court did ask
23 following that conference that we had in April on
24 restitution, to have the government submit a letter
25 addressing some of the issues that Mr. Kenner had raised

Proceedings

1 during that conference including among other things,
2 potential offsets based upon settlements that the victims
3 had reached and also he raised issues regarding Mr.
4 Pivittello (ph.) and Mr. Stephenson (ph.) and there was
5 some other issue as well.

6 So the government did submit a letter on April
7 16th that did contain its response including offsets of
8 certain loss amounts based upon monies that had been
9 recovered. Mr. Kenner put in a substantial response to
10 that on April 30th. It was filed May 7th, it was dated
11 April 30th. I have reviewed that as well. So I have a
12 couple of questions based upon that back and forth. And
13 then I did want to address the June 10th and the June
14 27th letters from the government regarding some
15 additional victims who want to be included in the
16 restitution amount.

17 First, I just want to make -- Mr. Kenner, you
18 did obviously raise a number of issues in your response,
19 some of them relitigating issues that you raised with the
20 Court previously regarding your belief regarding perjury
21 and other issues at the trial but one thing that you did
22 have in there that I just wanted to make sure you
23 understood is that you made reference to the fact that
24 certain victims weren't named as victims in the
25 indictment and/or did not testify at the trial. I just

Proceedings

1 want to make sure you understand, as a matter of law it
2 is not required -- a court, obviously if the burden of
3 proof has been met by a preponderance of the evidence,
4 can include victims who did not testify at the trial in
5 the restitution amount and also they don't have to all be
6 named in the indictment. As you know, the conspiracy
7 count was a very broad count that you were convicted of
8 and therefore, the Court has the discretion, assuming the
9 government meets its burden of proof and including those
10 amounts, notwithstanding the fact that there was not
11 trial testimony by that person and/or they were not
12 identified in the indictment but with respect to the
13 offset, I'm going to ask Mr. Haggans that Mr. Kenner does
14 raise in his opposition to your letter that he would like
15 the Court to have an in camera -- there is two issues
16 about the offsets as it relates to Northern Trust
17 settlements. One issue is whether or not he requests
18 that the Court can review in camera, the settlement
19 agreements to ensure that the amounts that were
20 articulated at the trial or at the hearing, I don't
21 remember if it was at the -- I think it was at the trial,
22 are consistent with the actual dollar amounts.

23 He also raises a legal issue which I don't
24 think the government has ever addressed. I think it
25 relates to Mr. Berard (ph.), that Mr. Berard gave a net

Proceedings

1 amount that he received \$300,000 from Northern Trust, net
2 the attorney's fees and other costs that he expended in
3 obtaining that money and Mr. Kenner's position is that
4 that is not -- the offset should be against the gross
5 amount and not the net amount of the settlement.

6 But let me just confirm, Mr. Haggans, did the
7 government have the actual documents or the government
8 was basing that upon the testimony in the record?

9 MR. HAGGANS: I would have to go -- this is
10 Matthew Haggans speaking, I would have to go back and
11 check my recollection sitting here today is that the
12 agent who assisted in putting together these figures
13 would've been going back to the Northern Trust documents
14 to confirm those offsets.

15 I can't think from what other source they
16 would've come but I'd have to go back to the documents
17 themselves and obviously, I don't -- as the Court knows,
18 restitution is not required to be calculated with
19 exactitude, it's a reasonable approximation is
20 sufficient. So I think given the longevity of the
21 proceeding, I think the record is adequate for the Court
22 to impose restitution with the records it has but if the
23 Court wishes for us to collect and produce the Northern
24 Trust documents, I will have to look back at where they
25 are. I'm sure they're saved electronically.

Proceedings

1

2

THE COURT: Yeah.

3

MR. HAGGANS: I'd have to look back.

4

THE COURT: When you say the Northern Trust documents, I'm not -- I mean, there's a lot of Northern Trust documents. I'm just referring to the settlement agreements that were just -- I'm talking about three documents, I think.

9

MR. HAGGANS: I'm sorry. I'm sorry, your Honor. That's what I am referencing.

11

THE COURT: Okay. Yeah, so I don't think it's an unreasonable request for Mr. Kenner to have the court review the settlement agreements that were reached with Northern Trust by the Pekas (ph.), Mr. Berard, and Mr. Nolan (ph.) but what's your view on the issue of gross versus net. And we're not talking -- when you say a "reasonable estimate", I think we're talking about -- I know we're not talking about like a few thousand dollars, I think Mr. Berard, I think it was hundreds of thousands of dollars difference between the gross and the net amount.

22

So unless Mr. Berard wants to forego, he's okay with the lower amount, then the government should brief to the Court whether or not as a matter of -- you know, I'm not talking about like an extensive brief but what's

23

24

25

Proceedings

1 the legal authority for subtracting out expenditures that
2 the victim makes in recovering the loss amount.

3 MR. HAGGANS: Certainly, your Honor. On the
4 first point, the Northern Trust settlement agreements, if
5 the government has them, we will produce them. I believe
6 that we do but I just -- I don't know that for a fact but
7 if we have them, we'll produce them, if we don't, we will
8 update the Court.

9 Regarding the --

10 THE COURT: Well, on that issue, I would ask
11 the victims that -- contact the victims and let them know
12 that I would like to review them in camera. Okay.

13 MR. HAGGANS: Understood, your Honor.

14 THE COURT: All right.

15 MR. HAGGANS: With regard to the issue of
16 costs, fees, et cetera, as a credit against restitution,
17 I have not -- candidly, I have not researched that issue.
18 My suspicion is that reasonable costs and fees incurred
19 in recovering funds that were lost due to criminal
20 conduct would be compensable in restitution but I have
21 not researched the issue.

22 THE COURT: All right. So you can put that in
23 a letter to me and we'll figure out a date in a minute.
24 The other issue -- well, let's see, the more recent
25 letters, Mr. -- I just want to make sure, Mr. Kenner,

Proceedings

1 that you -- I assume you've seen at least the June 10th
2 letter, I don't know about the June 27th letter. Have
3 you seen both of those letters, Mr. Kenner?

4 THE DEFENDANT: Your Honor, I was notified that
5 the -- there was a June 10 ECF 1063.

6 THE COURT: Right.

7 THE DEFENDANT: And maybe you could just
8 briefly tell me what it was. I couldn't locate that in
9 the materials that I have received.

10 THE COURT: It's the letter from Mr. Maine
11 (ph.) regarding Brian Kendell (ph.), Greg Devries (ph.),
12 Mateas Nordstrom (ph.) and Raymond Murray (ph.), were
13 meant to be included in the restitution order. It
14 attaches documents including their affidavits of loss.

15 THE DEFENDANT: If they are what I believe I
16 was briefed on, your Honor, it would be with respect to
17 their global settlement contributions.

18 THE COURT: Right. Right.

19 THE DEFENDANT: Okay. So we can proceed --

20 THE COURT: All right. And then the 27th --

21 THE DEFENDANT: -- (indiscernible).

22 THE COURT: Have you seen the one on the 27th,
23 ECF 1074? It's a chart from Government Exhibit Chart 15
24 regarding Mr. Devries?

25 THE DEFENDANT: I don't think I've ever seen

Proceedings

1 Chart Number 15. I know there was some question at trial
2 whether or not charts were going to come in and you know,
3 most of the government exhibits, I had not been forwarded
4 either at trial or --

5 THE COURT: All right.

6 THE DEFENDANT: -- post-trial.

7 THE COURT: The government's (indiscernible)?

8 MR. BRISSENDEN: Oh, your Honor, this is Matt
9 Brissenden, I was just going to say I attempted to
10 provide a summary of that filing from last night to Mr.
11 Kenner this morning but I am not certain he would've even
12 obtained the summary. I know he certainly hasn't seen
13 the document itself.

14 THE COURT: All right. Well, let me just ask
15 Mr. Haggans because I guess, Mr. Haggans, the bottom line
16 on these is I rely on the government obviously to
17 identify who they believe are the victims who should be
18 part of a restitution order and then to bring before the
19 Court, the evidence in the record that would support it.
20 So you know, the government is just forwarding this
21 information to the Court but what's the government's view
22 regarding these individuals and whether or not there is
23 evidence in the record to support the amounts that
24 they're claiming. I went back and I looked at the
25 government's and obviously, we've had revisions to the

Proceedings

1 chart for restitution purposes but I went back to
2 December 27th, 2019 chart and I didn't see their names on
3 that chart, so this proceeding was going on -- too long
4 for me to remember whether or not they were part of the
5 amount at some point or proposed to be part of the amount
6 and they were removed or why they're not on there. So
7 what's the government's position?

8 MR. HAGGANS: Certainly, your Honor. So the
9 government's position is in large part driven by the
10 Court's rulings as to what the Court believes is
11 compensable in restitution based upon the trial testimony
12 and the forfeiture proceedings and based upon those
13 rulings, the government has set out at ECF 1024, the
14 chart of what it believes adheres to those rulings as to
15 what is compensable.

16 That said, the victims of criminal conduct
17 under the mandatory victim restitution act, they have a
18 right to here of sentencing proceedings, a right to hear
19 of restitution proceedings as part of sentencing,
20 notwithstanding whether or not they may end up recovering
21 in restitution and so the government has been trying to
22 strike a balance between submitting what it believes
23 adheres to the Court's rulings as to what restitution
24 should reflect while also giving the victim's individuals
25 who believe they've been otherwise victimized by either

Proceedings

1 Mr. Kenner or Mr. Constantine, the ability to put papers
2 before the Court, for the Court's consideration and that
3 is reflected in many of the affidavits of loss that the
4 Court has received, I believe as to this most recent
5 supplement filed yesterday and the government had only
6 received that request over the weekend or perhaps late on
7 Friday for Mr. Devries but as to Mr. Devries, I believe
8 he had also submitted an affidavit of loss for the Court
9 to consider. The government's position is reflected in
10 ECF 1024, however.

11 THE COURT: All right. When you say based upon
12 the Court's ruling, I just want to make clear that I did
13 make certain rulings, both with respect to Mr. Kenner and
14 Mr. Constantine that effected both the loss amounts for
15 sentencing purposes and the restitution amount but what
16 they're arguing here is that they were part -- they put
17 money into the global settlement fund and in the most
18 recent submission, they're also pointing out that Mr.
19 Devries with \$100,000 into Euphora (ph.) that then went
20 to Mr. Barn (ph.) and then to certain expenses and other
21 -- that's what the chart obviously is trying to
22 demonstrate to the Court.

23 So I don't believe I made any rulings with
24 respect to either of those things, whether it be GSF
25 (ph.) or Euphora that would place them outside -- you

Proceedings

1 know, those are within the scope of the offenses of
2 conviction and as long as there is proof in the record to
3 support those particular amounts, then I don't see how
4 they're differently situated than the other people who
5 are recovering. So that's the issue.

6 I haven't gone back through the record
7 obviously and I -- again, I rely on the government, if
8 the government is saying there's not evidence in the
9 record to support what they're asking for in terms of the
10 fund and the money going into the fund or there's some
11 other issue with respect to what they're claiming, that's
12 one thing but I haven't heard that and I was looking back
13 through the various filings trying to figure out if
14 again, they were at some point removed from the list
15 because of an issue like that but have you looked into
16 that or no?

17 MR. HAGGANS: In response to these most recent
18 supplements from Mr. Maine and Mr. Devries, no, no, I
19 have not your Honor, in light of the fact that the
20 government is going to be briefing on a couple of
21 additional issues, the government's happy to reconsider
22 those submissions and state a revision to its position,
23 if necessary.

24 THE COURT: All right. Thank you. That's I
25 think is what needs to be done because I want to be able

Proceedings

1 to address what they're saying and I am not in a position
2 to do that right now but Mr. Kenner, do you want to
3 address that?

4 THE DEFENDANT: Your Honor, I would suggest in
5 the larger scope, you know, it is six years since trial
6 and probably four to five years since forfeiture and
7 restitution issues had been addressed initially by the
8 Court, so I am kind of surprised on the eve of this
9 hearing which is the second restitution hearing, that
10 some of these issues had been raised.

11 Now notwithstanding the timing issue, your
12 Honor and I hope you can hear me clearly, there was
13 trouble with the phone earlier.

14 THE COURT: Yes, I can hear you.

15 THE DEFENDANT: All right. Thank you, your
16 Honor. The government with respect to these issues, this
17 is not a -- these were not case elements or alleged
18 scheme elements similar to the United States v. Kalish,
19 which was a simple mass fraud based on documented
20 mailings to a mass marketing group of people. These were
21 individual conversations between Mr. Constantine and a
22 number of these contributors to Constantine's global
23 settlement fund.

24 As example, I think if I remember correctly off
25 the record, Mr. Rouchin (ph.) had testified somewhere

Proceedings

1 around the transcript, page 2,750, maybe 2,751, that he
2 expected on his contribution to the global settlement
3 fund to go to Mr. Richards for attorney's fees and when
4 you look at, I believe it was Government Exhibit 767, if
5 I remember correctly, when his May 26th contribution was
6 made for \$50,000, that next day or excuse me, that same
7 day, \$50,000 was sent to Mr. Richards by Mr. Rouchin and
8 then subsequently, \$95,000 was sent to Mr. Richards'
9 account for fees.

10 So Mr. Rouchin as far as what he testified to
11 at trial, which I guess would be the basis of a Fatico
12 hearing, individual by individual, said he expected his
13 50-grand to go to Mr. Richards and the money tracing
14 actually represented that.

15 So in the same context that any other
16 contributor to Mr. Constantine's global settlement fund,
17 you know, has some argument for loss, I would ask that
18 the Court, you know, reflect that the acknowledgment and
19 acceptance agreements that the individuals had signed
20 with Mr. Constantine plus the follow-up emails they had
21 received and interacted with Mr. Constantine, are
22 reflected in the actual transactions Mr. Constantine
23 utilized the funds for that I believe Mr. Richards said
24 he only took instructions from Mr. Constantine on those.
25 I believe the transcript started at page 3,805,

Proceedings

1 continuing for about 11 page to 3,816, if I remember
2 correctly.

3 So you know, in assuming the government --

4 THE COURT: Well, let me just interrupt you.
5 I'll give you a chance to -- I just want to address what
6 you said and this might be helpful to Mr. Haggans. It
7 may be that the reason they are not included is because
8 they did not testify at the trial and therefore, the
9 government did not believe they were in a position to
10 meet the standard that would be necessary to show that
11 they were defrauded in the same way the victims who
12 testified at the trial, in my view, were defrauded.

13 So that may be the reason why they -- you know,
14 obviously the other individuals who are listed testified
15 at the trial, I think in large part, maybe there's one
16 who did not but so that may be the answer to the question
17 I asked to the government and I understand what you're
18 saying, if in fact, they did wish to be included, there
19 might be additional fact-finding which the Court for the
20 reasons that Mr. Haggans and you just indicated, is not
21 inclined to do at this point.

22 To the extent that the record is not sufficient
23 to support them being included either as to the fact that
24 they were defrauded or as to the amount, it's not my
25 inclination at this point to reopen for some type of

Proceedings

1 restitution hearing because of how many years has gone
2 by. All right. But we'll see what the government says,
3 if -- that may be the answer to the question, okay?

4 THE DEFENDANT: And your Honor, can I assume
5 I'll have an opportunity to at least reply to the
6 government's position? Ultimately, under I think it was
7 a Supreme Court ruling, *QE v. United States* 495 U.S. 411
8 at 413, they --

9 THE COURT: Yeah, I will --

10 THE DEFENDANT: -- had to (indiscernible) --

11 THE COURT: I will give you a chance. Again, I
12 don't expect this -- I'm not looking for voluminous
13 briefing from the government, I'm just asking them
14 essentially to remind me of why these individuals are not
15 included and then I'll give you a chance to respond. I
16 don't think this is going to delay the proceeding much
17 further because it's going to take a little bit of time
18 to submit those Northern Trust settlement agreements to
19 the Court and have me review them, so I am thinking a
20 couple of weeks, not a couple of months, all right?

21 THE DEFENDANT: And that's a couple of weeks
22 for the government to submit their settlement versus net
23 recovery issues plus the additional MVRA victim analysis
24 based on the most recent submissions to the Court; is
25 that correct?

Proceedings

1 THE COURT: Yeah, my goal is to have them do it
2 in may be two weeks, give you two weeks to respond and my
3 goal is to have one final proceeding in late July,
4 hopefully we can do it by way of video if we get the
5 request into the jail now and that will be it, all right?

6 On your compassionate release motion, my
7 intention is not to -- I'm going to receive that on the
8 papers and then I am going to issue an order. I didn't
9 plan on ruling on that today or at this next proceeding
10 in a few weeks, okay?

11 THE DEFENDANT: So if you could just restate
12 that for clarity, your Honor, the phone connection was
13 just a little weak.

14 THE COURT: I said I'm not -- with respect to
15 your motion for compassionate relief, I think that all
16 the papers have been submitted and it was not my
17 intention to rule on that either today or at the
18 proceeding in a couple of weeks. My intention was to
19 address that in writing in a written order.

20 THE DEFENDANT: Okay. And does your Honor have
21 any time frame on that actual review?

22 THE COURT: I can't give you a --

23 THE DEFENDANT: Just out of curiosity, your
24 Honor.

25 THE COURT: -- (indiscernible).

Proceedings

1 THE DEFENDANT: That's it.

2 THE COURT: And my hope would be that it would
3 be shortly after we finish the restitution piece.

4 THE DEFENDANT: Thank you. Thank you, your
5 Honor.

6 THE COURT: All right. So does the government
7 have other issues that it wanted to address with the
8 Court? And obviously, I will rule on the other
9 outstanding matters that Mr. Kenner raised that the
10 government responded to. I was going to do it piecemeal.
11 I was going to place all the rulings on the record at one
12 time.

13 MR. HAGGANS: Understood, your Honor. So just
14 for purposes of the record, I think I'll restate what the
15 government thinks remains active. So restitution
16 obviously, the government will update on I think it's
17 three separate issues, the Northern Trust settlements,
18 the compensability of costs and fees with specific
19 applicability to Mr. Berard and to the collectively, the
20 submissions by Mr. Maine on behalf of a number of people
21 and Mr. Devries on his own behalf and whether those are
22 compensable, all under the bucket of restitution and I
23 think the date the Court's looking for is -- two weeks
24 from today is the 12th. I have another filing due that
25 day, if I could just request the 13th.

Proceedings

1 THE COURT: Sure.

2 MR. HAGGANS: That's all right? Okay.

3 THE COURT: Yes. And what's your understanding
4 of how long the jail -- if you put in a request now for
5 like late July --

6 MR. HAGGANS: Yeah, I was trying to find the
7 last update I got. My sense is it's booked at least a
8 month out. So I would benefit, if the Court would give
9 me sort of a handful of alternative dates and then we can
10 pick one and I'll fire back to the Court's deputy to
11 confirm one of those dates.

12 THE COURT: All right. Hold on.

13 MR. HAGGANS: Perhaps the week of the 26th or
14 the week of the 2nd of August.

15 THE COURT: Well, let me just make sure Mr.
16 Kenner -- Mr. Kenner, if you get the government's
17 submission on July 13, how long do you think you need to
18 respond?

19 THE DEFENDANT: Your Honor, I will get back as
20 fast as I am allowed (indiscernible) time.

21 THE COURT: Well, why don't we do this? My
22 hope would be that -- you know, if they come back and
23 they say -- again, if they come back and say the reason
24 these individuals weren't included is because they didn't
25 testify at trial and we didn't think it could be

Proceedings

1 established without such testimony or an additional
2 hearing, then obviously they're not going to be a lot for
3 you to respond to.

4 THE DEFENDANT: Yes, sir.

5 THE COURT: So why don't we set a date that --
6 you can always ask me for more time if you need it but I
7 am trying to avoid, again this is, I think, part of your
8 interest to try to resolve this as soon as possible,
9 so --

10 THE DEFENDANT: Yes.

11 THE COURT: -- you can always ask for more time
12 okay?

13 THE DEFENDANT: Yeah, that's great, your Honor
14 and if the government could just expedite the delivery.
15 I know they do accept FedEx or U.S. Postal, I'm not sure
16 what the government uses, get that reply to me, so I can
17 work on it. I'll have it back out immediately.

18 THE COURT: All right. So why don't we say
19 July 13th -- why don't you try for July 23rd?

20 THE DEFENDANT: Great. No problem.

21 THE COURT: Yes, let me know if there's a
22 problem and Mr. Haggans, if you could try to get it for
23 the week of the 26th or the week of the 2nd. Court's --
24 let me just check -- hold on. Yeah, we have matters on
25 both of those weeks but just you know, check with my

Proceedings

1 chambers just to make sure that there's not something we
2 can't move. We'll move other matters if we need to if
3 there's only one slot available for either of those
4 weeks, okay?

5 MR. HAGGANS: And this would be -- yes, your
6 Honor, this would be via VTC, not audio?

7 THE COURT: Right. Exactly.

8 MR. HAGGANS: With audio is the much less
9 preferred backup, I suppose.

10 THE COURT: Yeah, much less preferred
11 because --

12 MR. HAGGANS: Okay.

13 THE COURT: -- you know, I think it's under the
14 statute, it says not reasonably available. It is
15 reasonably available, this issue of timing, all right?

16 MR. HAGGANS: Understood, your Honor.

17 THE DEFENDANT: Your Honor, with respect to
18 logistics, I'm fine either way, so as not to delay the
19 proceeding any longer.

20 THE COURT: Okay. That's good to know and if
21 you can't get one for one of those two weeks, we'll do
22 the audio, okay?

23 THE DEFENDANT: That is fine with me, your
24 Honor.

25 THE COURT: All right. And Mr. Brissenden,

Proceedings

1 obviously we'll work around your schedule too just to
2 make sure you're available.

3 THE DEFENDANT: Mr. Brissenden (indiscernible).

4 MR. BRISSENDEN: Of course, your Honor. Thank
5 you.

6 THE COURT: All right. Mr. Kenner, are there
7 any other issues you want to address today?

8 THE DEFENDANT: Just quickly, your Honor, if I
9 could. First, I was alerted that there was a third-party
10 claim that was sent into the Central Islip courthouse on
11 October 2nd of 2020, delivered FedEx and it was signed by
12 an R. Deanna, D-E-A-N-N-A and I was told that that was
13 not docketed as a third-party claim and I didn't know how
14 perhaps the Court assist in tracking down who R. Deanna
15 was who signed for an international priority delivery on
16 October 2nd of 2020, a third-party ancillary claim to the
17 forfeiture.

18 THE COURT: Well, let me -- it is something the
19 government put on -- is that part of the submission it
20 made a few weeks ago where they filed third-party
21 petitions? Is that what you're basing this on?

22 THE DEFENDANT: Yes, the person's name was not
23 indicated in any filing that I've seen and so I had asked
24 for confirmation of the FedEx delivery and I received the
25 shipping confirmation slip from Federal Express which

Proceedings

1 showed the --

2 THE COURT: Why -- how does that concern you?
3 Your forfeiture is done, so I am not sure what your
4 interest is in terms of the timing of the third-party
5 claimant at this point. Your forfeiture is over.

6 THE DEFENDANT: That's fine, your Honor. I
7 accept that and we can move on.

8 The second point then is I will just ask that I
9 was alerted that Mr. Kaiser had represented a collateral
10 agreement for a third-party claim against the property
11 which would be in fact the contemporaneous offset for the
12 million dollars that the government still has in chart on
13 page 2, 3 and 4 of document 1024. So it seems to have
14 some contradiction in Mr. Kaiser having a collateralized
15 offset 15 years ago for something he claims is -- the
16 government still has on as a \$1.08 million restitution
17 issue. So maybe I could just address that when I follow-
18 up with the other (indiscernible) --

19 THE COURT: Yeah, you could put that in your
20 letter. I can't say that I am familiar with -- that was
21 in his petition, the third-party petition?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Yes.

24 THE DEFENDANT: I was just -- no, I haven't
25 seen the exact paperwork but I was just alerted by

Proceedings

1 someone --

2 THE COURT: All right.

3 THE DEFENDANT: -- that had actually been
4 submitted. And then I had asked as part of a submission,
5 ECF !026, if the government could produce the letter that
6 the FBI told the Pekas they found on my laptop with
7 respect to an IRS audit that seemed to be haunting the
8 Pekas for -- I think Ms. Peka said for a decade now. I
9 had asked that that letter could actually be produced.

10 THE COURT: Yes, your request to the Court
11 contained a letter with a request like that but I just
12 want to emphasize, there's no ongoing discovery with
13 respect to the case as a whole. Other than the
14 restitution piece, any issues you have with respect to
15 the Pekas, you know, the proof at trial, those are going
16 to be obviously the subject of an appeal. The Court is
17 not continuing to order discovery by the government of
18 things unrelated to restitution at this point, all right?

19 THE DEFENDANT: And your Honor, again just
20 because I am an autodidact and not a trained professional
21 in this, my question then I guess finally would be does
22 that also relate to the Pekas talking about a murder
23 phone call that would fall under Giglio material or Mr.
24 Kaiser's 2012 statements that he made during the 10/28/20
25 hearing on pages 47 to 50 where he had alerted the

Proceedings

1 government before my indictment and before my trial that
2 he had been recording Mr. Jawdi (ph.) who had been
3 stealing money and that contradicted his main trial
4 testimony, both Giglio issues that were never turned over
5 and I think it's --

6 THE COURT: Yes, well first of all, I don't --
7 again, I was at the sentencing. I didn't hear anything
8 Ms. Peka said that created a Giglio issue. I said with
9 respect to those allegations though, she's making for
10 sentencing that I wasn't considering them in sentencing
11 you but I don't know what that has to do with you
12 defrauding the Pekas and I don't know -- I don't remember
13 exactly what you're referring to with respect to Mr.
14 Kaiser that there were recordings.

15 THE DEFENDANT: Mr. Kaiser had espoused on the
16 ten -- the October 28, 2020 hearing post-sentencing at
17 transcript pages 47 to 50, that in 2012, he told the
18 government that Jawdi was robbing everybody and he had
19 made recordings of Mr. Jawdi and his accountants and
20 others and has affirmed that he had made these
21 representations to the government and to the FBI pre-
22 indictment (audio interference) trial and those Giglio
23 comments never seemed to find their way to us in Jenks or
24 Brady materials and I think under United States v.
25 Rodriguez, 496 F.3d 221 at 226, the Second Circuit in

Proceedings

1 2006 suggested otherwise, that the government, even if
2 the statements were undocumented by them or unrecorded by
3 them, they were still exculpatory to the allegations that
4 the government raised early in their opening remarks, I
5 think at transcript page 31. So I was wondering what my
6 recourse is for those Giglio statements by Mr. Kaiser.

7 THE COURT: Mr. Haggans, do you know what he is
8 referring to with respect to the recordings?

9 MR. HAGGANS: I do not, your Honor, candidly.

10 THE COURT: All right. Well, your recourse,
11 Mr. Kenner, if you believe something came out at the
12 sentencing that indicates the government did not comply
13 with its Giglio obligations, you can obviously raise that
14 on appeal. It's on the record, whatever was said was
15 said. You can raise it on appeal. Obviously, Mr.
16 Haggans, if you want to respond to that in your
17 supplemental submissions just so the record is clear as
18 to whether or not there is or is not an issue with
19 respect to those recordings, you may do so, all right?

20 MR. HAGGANS: Understood, your Honor. Thank
21 you.

22 THE COURT: All right. Thank you very much.
23 So Mr. Haggans, you'll obviously let everybody know.
24 You'll submit a letter confirming the date and the time,
25 so that Mr. Kenner and everybody knows once you talk to

Proceedings

1 the jail?

2 MR. HAGGANS: For the VTC, the week of the 26th
3 or the 2nd, yes, I will.

4 THE COURT: All right. Great. All right.
5 Thank you very much, everybody. Have a good day.

6 MR. HAGGANS: Thank you, your Honor.

7 MR. BRISSENDEN: Thank you, your Honor.

8 (Matter Concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 30th day of June 2021.


Linda Ferrara

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